U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 08 February 2007

Case No.: 2006-LHC-211

OWCP No.: 08-123313

IN THE MATTER OF

J. S.,
Claimant

vs.

SHIPPERS STEVEDORING CO., INC.,
Employer

APPEARANCES:

STEPHEN M. VAUGHAN, ESQ.,
On Behalf of the Claimant

C. DOUGLAS WHEAT, ESQ.,
On Behalf of the Employer

BEFORE: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Longshore Harbor Workers' Compensation Act (the Act),[1] brought by J.S. (Claimant) against Shippers Stevedoring Company, Inc. (Employer).

[1] 33 U.S.C. §901 *et seq.*

The matter was referred to the Office of Administrative Law Judges for a formal hearing. Both parties were represented by counsel. On 6 Sep 06, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:[2]

Witness Testimony of
Claimant

Exhibits
Claimant's Exhibits (CX) 1-23[3]
Employer's Exhibits (EX) 1-17[4]

My findings and conclusions are based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

STIPULATIONS[5]

1. Claimant was involved in an accident on 29 Nov 03.

2. It occurred in the course and scope of his employment as a longshoreman as defined under the Act.

3. There was an Employee/Employer relationship at the time of the accident.

[2] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

[3] In CX-11, Claimant's Counsel submitted a copy of Claimant's social security earnings that was so faded that it was virtually impossible to read with any certainty. In the absence of any dispute as to Claimant's actual earnings history, the submission of such a document is a waste of time and resources, but ultimately did not harm Claimant's ability to litigate his case.

[4] Counsel were informed that since Claimant testified live at hearing, only those parts of his deposition (EX-1) specifically cited by Counsel on brief or at hearing would be considered part of the record upon which the Court would base its decision. In addition, Employer's counsel appended to its brief a large number of documents labeled as exhibits. They included copies of cases cited, various documents and records, a deposition, and the formal hearing transcript. Some of the documents had already been admitted as Employer exhibits at hearing. The citations to Employer exhibits in Employer's post-hearing brief did not refer to the exhibits Employer offered and the Court admitted at hearing, but rather the documents attached to its brief. However, since the record had closed and Claimant did not have a chance to examine or object to any of the attachments to the post-hearing brief, I did not consider the submissions for any substantive purpose, with the exception of the deposition of Dr. Vanderweide (submitted as exhibit 2 to Employer's brief), which was referred to and admitted on the record as EX-17. The transcript of the formal hearing was part of the record in any event. On brief, Employer's counsel cited to pages in EX-1, but was not actually referring to EX-1, which was Claimant's deposition, but rather to his testimony at the hearing.

[5] Tr. 8-10.

4. There was proper and timely notice of the injury to Employer.

5. If Claimant is disabled to any extent, as to his 29 Nov 03 injury, no suitable alternative employment has been demonstrated and Claimant is totally disabled.

FACTUAL BACKGROUND

Claimant was working as a clerk checker when a forklift ran over a timber, shooting it into his feet and knocking him onto his chest. He has not returned to work. He had a highly intermittent work history before the accident.

ISSUES

Average Weekly Wage

Both sides argue that the average weekly wage (AWW) should be calculated by applying Section 10(c). Claimant suggests that because he was unable to work for significant periods of time for the past few years, the Court should use the last year in which he had a full year of wages, 1999. Employer responds that an appropriate calculation would take into consideration only his pay over the 52 weeks immediately preceding the injury, which would yield an AWW of $5.95. In the alternative, Employer suggests adding Claimant's earning for the last 10 years and dividing that sum by the number of years worked.

Requested Medical Care

Claimant seeks a number of diagnostic and treatment modalities for his cervical spine. Employer responds that any cervical spine problems are degenerative in nature and not related to his 29 Nov 03 accident.

Nature and Extent of Disability

Claimant alleges that he has been temporarily totally disabled since the date of injury. Employer argues that even with the cervical problems, as of 17 May 04, Claimant was able to return to his original employment.

Penalties

Claimant argues that there was no controversion, and that Employer is liable for penalties under Section 14(e) of the Act. Employer did not address the issue of controversion at hearing or on brief, other than to say that it was disputed.

LAW

Although the Act must be construed liberally in favor of the claimant,[6] the "true-doubt" rule, which resolves factual doubts in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act,[7] which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion.[8]

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners.[9]

Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings,[10] which are then divided by 52[11] to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury.[12]

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage.[13]

Section 10(b) provides:

> If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings if a six-day worker, shall consist of three hundred times the average daily wage or salary and, if a five-day worker, two hundred and sixty times the average

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[6] *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *Britton*, 377 F.2d 144.
[7] 5 U.S.C. § 556(d).
[8] *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct 2251 (1994), *aff'g* 900 F.2d 730 (3rd Cir. 1993).
[9] *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98, 101 (1997); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Bank v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968).
[10] 33 U.S.C. § 910(a)-(c).
[11] 33 U.S.C. § 910(d).
[12] *SGS Control Services v. Director, Office of Worker's Compensation Programs*, 86 F.3d 438, 441 (5th Cir. 1996); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff'd sum nom., Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).
[13] 33 U.S.C. § 910(a).

> daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.[14]

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 260 days for a 5-day worker in order to determine average annual earnings.[15]

If neither Sections 10(a) or 10(b) "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate.[16]

A worker's average wage may be based on his earnings for the limited period he worked for the employer rather than on the entire prior year's earnings, if a calculation based on the wages at the employment where he was injured would best reflect a claimant's earning capacity at the time of the injury.[17]

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which [he] was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.[18]

The court has broad discretion in determining annual earning capacity under Section 10(c).[19] The objective of Section 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of his injury.[20] A

[14] 33 U.S.C. § 910(b).
[15] 33 U.S.C. § 910(a)–(b).
[16] *Empire United Stevedore v. Gatlin*, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).
[17] *Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981).
[18] 33 U.S.C. § 910(c).
[19] *Hayes v. P & M Crane Co.*, 930 F.2d 424 (5th Cir. 1991); *Hicks v. Pacific Marine & Supply Co., Ltd.,* 14 BRBS 549 (1981).
[20] *See Barber*, 3 BRBS 244.

definition of "earning capacity" for the purpose of calculating AWW is the "ability, willingness, and opportunity to work," or "the amount of earnings the claimant would have the potential and opportunity to earn absent injury."[21] In determining earning capacity, wages which would have been earned but for events not likely to reoccur may be considered.[22]

Section 10(c) is used where a claimant's employment is seasonal, part-time, intermittent, or discontinuous.[23] In calculating annual earning capacity under Section 10(c), the court may consider: the actual earnings of the claimant at the time of injury,[24] the earnings of other employees of the same or similar class of employment,[25] claimant's earning capacity over a period of years prior to the injury,[26] claimant's wage rate multiplied by a time variable,[27] probable future earnings of claimant,[28] or any fair and reasonable representation of the claimant's wage-earning capacity.[29] An annual wages calculation may include the wages the claimant would have earned but for personal illness or injury.[30]

Under Section 10(c), the court must arrive at a figure which approximates an entire year of work (the average annual earnings).[31]

Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment."[32] In the absence of any substantial evidence to the contrary, the Act presumes that a claim comes within its provisions.[33] The presumption

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[21] *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980).

[22] *Hawthorne v. Director, OWCP*, 844 F.2d 318 (6th Cir. 1988) (strike); *Le Batard v. Ingalls Shipbuilding Div., Litton Sys.*, 10 BRBS 317 (1979) (layoff); *Browder v. Dillingham Ship Repair*, 24 BRBS 216 (1991) (mother's funeral); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984) (automobile accident); *Richardson v. Safeway Stores*, 14 BRBS 855 (1982) (gall bladder operation).

[23] *Gatlin*, 935 F.2d at 822.

[24] 33 U.S.C. § 910(c); *Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990), *vac'd in part on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339, 344-45 (1988).

[25] 33 U.S.C. § 910(c); *Palacios v. Campbell Indus.*, 633 F.2d 840, 842-43, 12 BRBS 806 (CRT) (9th Cir. 1980); *Hayes*, 23 BRBS at 393.

[26] *Konda v. Bethlehem Steel Corp.*, 5 BRBS 58 (1976) (all the earnings of all the years within that period must be taken into account).

[27] *Lozupone v. Stephano Lozupone & Sons*, 14 BRBS 462, 465 (1981); *Cummins v. Todd Shipyards Corp.,* 12 BRBS 283, 287 (1980) (if this method is used, must be one which reasonably represents the amount of work which normally would have been available to the claimant. *Matthews v. Mid-States Stevedoring Corp.*, 11 BRBS 509, 513 (1979)).

[28] *Palacios*, 633 F.2d at 842-43; *Walker v. Washington Metro. Area Transit Auth.*, 793 F.2d 319, 321, 18 BRBS 100 (CRT) (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); *Gilliam v. Addison Crane Co.*, 21 BRBS 91, 93 (1987).

[29] *See generally, Flanagan Stevedores, Inc. v. Gallagher and Director, OWCP*, 219 F.3d 426 (5th Cir. 2000).

[30] *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984).

[31] *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990).

[32] 33 U.S.C. § 902(2).

[33] 33 U.S.C. § 920(a).

takes effect once the claimant establishes a *prima facie* case by proving that he suffered some harm or pain and that a work-related condition or accident occurred, which could have caused the harm.[34]

A claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain.[35] These two elements establish a *prima facie* case of a compensable "injury" supporting a claim for compensation.[36]

If the work injury aggravates a pre-existing condition, the aggravation is compensable under the Act. Employers accept their employees with the frailties which predispose them to bodily injury.[37]

The presumption does not apply, however, to the issue of whether a physical harm or injury occurred[38] and does not aid the claimant in establishing the nature and extent of disability.[39]

A claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption.[40]

Nature and Extent of Disability

Once it is determined that he suffered a compensable injury, the burden of proving the nature and extent of his disability rests with the claimant.[41] Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or permanent). The permanency of any disability is a medical rather than an economic concept.

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[34] *Gooden v. Director, OWCP*, 135 F.3d 1066 (5th Cir. 1998).
[35] *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981), *aff'd sub nom. Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990).
[36] *Id.*
[37] *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144, 147-8 (D.C. Cir. 1967).
[38] *Devine v. Atlantic Container Lines, G.I.F.*, 25 BRBS 15 (1990).
[39] *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979).
[40] *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982).
[41] *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980).

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment."[42] Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown.[43] Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage-earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.[44] A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement.[45] Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature.[46]

The question of extent of disability is an economic as well as a medical concept.[47] To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury.[48]

A claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability.[49] Once a claimant is capable of performing his usual employment, he suffers no loss of wage-earning capacity and is no longer disabled under the Act.

To establish a *prima facie* case of total disability, the employee need only show he cannot return to his regular or usual employment due to his work-related injury.[50] If the claimant makes this *prima facie* showing, the burden shifts to employer to show suitable alternative employment.[51] The presumption of disability ends on the earliest date that the employer establishes suitable alternate employment.[52]

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[42] 33 U.S.C. § 902(10).
[43] *Sproull*, 25 BRBS at 110.
[44] *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968) (per curiam), *cert. denied*, 394 U.S. 876 (1969); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996).
[45] *Trask*, 17 BRBS at 60.
[46] *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984); *SGS Control Services*, 86 F.3d at 443.
[47] *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).
[48] *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994).
[49] *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988).
[50] *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984).
[51] *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); *Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986).
[52] *Palombo v. Director, OWCP*, 937 F.2d 70, 25 (2d Cir. 1991).

The employer is liable only for the degree of disability attributable to the covered injury or its natural progression. It is not responsible for disability attributable to an independent intervening cause.[53]

Medical Care and Benefits

Section 7(a) of the Act requires employers to provide reasonable and necessary medical care.[54]

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.[55]

An employer is liable for all medical expenses which are the natural and unavoidable result of a claimant's work injury. For medical expenses to be assessed against an employer, the expenses must be both reasonable and necessary.[56] Medical care must also be appropriate for the injury.[57]

A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition.[58]

Section 7 does not require that an injury be economically disabling for a claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury.[59] Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury.[60]

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect, or refusal.[61] Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek

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[53] *Wheeler v. Intercocean Stevedoring, Inc.*, 21 BRBS 33 (1988).
[54] 33 U.S.C. § 907(a).
[55] 33 U.S.C. § 907(a).
[56] *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979).
[57] 20 C.F.R. § 702.402.
[58] *Turner,* 16 BRBS at 257-258.
[59] *Ballesteros*, 20 BRBS at 187.
[60] *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1980); *Wendler v. American National Red Cross*, 23 BRBS 408, 414 (1990).
[61] *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 103 (1997); *Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), *rev'g* 6 BRBS 550 (1977).

authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury.[62]

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment.[63] Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care.[64] Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care.[65]

Penalties

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In order to controvert the right to compensation, the employer must file a notice on or before the 14th day after it has knowledge of the alleged injury or death or is given notice.[66] The employer must file on or within the 14th day after it has knowledge of the injury, not knowledge of the claim.[67] Where the employer fails to file a notice of controversion, its liability under 14(e) terminates when the Department of Labor "knew of the facts that a proper notice would have revealed."[68] Therefore, where an employer fails to file a timely notice of controversion it has 28 days from the date of knowledge within which to pay compensation without incurring liability under 14(e).

The essential elements of the notice include a statement that the right to compensation is controverted, the names of the claimant and employer, the date of the alleged injury, and the grounds for controversion.[69]

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[62] *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988); *Rieche v. Tracor Marine*, 16 BRBS 272, 275 (1984).
[63] *See generally*, 33 U.S.C. § 907(d)(1)(A).
[64] *Mattox .v Sun Shipbuilding & Dry Dock Co.*, 15 BRBS 162 (1982).
[65] *Id*.
[66] *See Spencer v. Baker Agric. Co.*, 16 BRBS 205, 209 (1984).
[67] *See Jaros v. National Steel Shipbuilding Co.*, 21 BRBS 26, 32 (1988); *Spencer*, 16 BRBS at 209; *Wall v. Huey Wall, Inc.*, 16 BRBS 340,343 (1984); *Miller v. Prolerized New England Co.*, 14 BRBS 811, 821 (1981); *Davonport v. Apex Decorating Co.*, 13 BRBS 1029, 1041 (1981); *Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142 (1985).
[68] *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1295 (9th Cir. 1979); *Hearndon v. Ingalls Shipbuilding Inc.*, 26 BRBS 17, 20 (1992) (DOL knew of facts that proper notice would have revealed when case was referred to OALJ for formal hearing).
[69] See 33 U.S.C. § 914(d).

An informal conference may satisfy the requirement to notify the Department of Labor and extinguish liability for Section 14(e) penalties. Liability ceases on the earlier date of the filing of the notice of controversion or informal conference.[70]

The title of the document is not determinative and if a document contains all of the required information, it may be considered equivalent to a notice of controversion.[71] A notice of suspension of payments may also qualify.[72]

EVIDENCE

Claimant testified at trial in pertinent part that: [73]

He started working as a longshoreman in 1978, as a clerk checker.

Clerk checkers are responsible for making sure cargo gets to the right place and in the best condition possible. They ensure the count is correct and do a lot of paperwork. It is not a physically demanding job, except when the clerk has to go into a rail car to identify cargo. Most rail cars only have access through the top, so the clerk has to climb onto the rail car on steel rungs used as a ladder. Clerks also have to go into the holds of ships to check cargo. They access those holds by climbing onto the gangway, into the ship, and down the steel rungs of the hold. They have to climb vertical, horizontal, and angled ladders. The ladders can be several stories high. Clerks also have to get seal numbers from containers when they are on the trucks or in the cargo hold. Clerks have to climb onto the trucks and try to find a way to reach the container doors. In the course of his shift, a clerk checker may have to climb up on trucks forty or fifty times in four hours, depending on how fast the containers are moving.

He had breaks in his work history in the 1990's. In 1995, he had diverticulitis. It was serious and required a colostomy for almost a year. In 1996, he had the colostomy removed. In 1997, he had an operation to repair the hernia caused by the incision from the 1995 surgery for diverticulitis. In 1999, he had another hernia surgery. He had fractures in his right ankle in 2000 and 2001. In 2002, he had surgery for his 2001 ankle fracture.

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[70] *National Steel & Shipbuilding Co. v. U.S. Dep't of Labor*, 606 F.2d 875 (9th Cir. 1979), *aff'g in part and rev'g in part Holston v. National Steel & Shipbuilding Co.*, 5 BRBS 794 (1977).
[71] *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245, 249 (1991), *aff'd on recon. en banc*, 25 BRBS 346 (1992).
[72] *White v. Rock Creek Ginger Ale Co.*, 17 BRBS 75, 79 (1984), White v. Rock Creek Ginger Ale Co., 17 BRBS 75, 79 (1984), rev'g Garner v. Olin Corp., 11 BRBS 502 (1979), 11 BRBS 502 (1979).
[73] Tr. 22-51

He probably did not have a full year of wages in 1999, but may have in 1998. Claimant was not working full time before he had his March 2000 ankle injury because he was still recovering from one of his surgeries and may have been taking some classes at the University of Houston. He studied political science. He went for four years. The last time he was at the University of Houston was the spring semester of 2004. He is about 18 hours short of a degree.

He believes that 1998 was probably the last year he worked a full year. He stopped being a longshoreman in 1985 and went to work for the Adult Probation Department because he wanted to do something different. However, he got burned out and went back to being a longshoreman.

He was off work for about eleven months after his March 2000 broken ankle. He returned to work for about four months before he was off work again. He re-injured his ankle in May 2001. He again returned to work, but only worked for two days before his 29 Nov 03 injury.

On 29 Nov 03, he was working with a team, as a clerk checker, placing pipe in a warehouse. A forklift lifted the load of pipe and ran over a four by four by six piece of timber. The timber shot out from under the tire and hit him across both feet and ankles, flipping him forward chest first onto the floor. He felt something pop in his neck, chest, and the entire left side of his torso. He also felt several cracks. Everything went white and he thought he was "taking his last breath."

The next morning, a friend drove him to his family physician, Dr. Moers. Dr. Moers is not a specialist and eventually sent him to Dr. Eidman. He does not know if either Dr. Moers or Dr. Eidman is owed any money on bills for treating him. In September 2004, Employer began denying all prescription medical expenses.

Dr. Moers and Dr. Nowlin did functional capacity evaluations. They lasted three hours or more. Afterward, he felt pretty bad for several weeks. He wanted to give a good effort and probably pushed a little too hard. For two or three weeks, he paid for it with pain.

When he was evaluated by Dr. Vanderweide, he spent 30 minutes in the waiting room and then was placed in an examination room. He was left in the examination room for about three hours with the doors closed and no ventilation or air conditioning before he saw the doctor. It got so hot his clothes and hair were soaked. He complained and asked the nurse to put him in another room, but she only left the door open.

After three hours, Dr. Vanderweide came in. He seemed to be quite angry about something and asked several questions. The doctor spent ten-fifteen minutes trying to get him to say that he fell, when he was actually flipped with the timber. He told the doctor if that was how the doctor wanted to put it, then he fell. The doctor did not examine him physically, but only asked some questions. The doctor did not even ask why he was sweating so profusely.

He did not tell Dr. Vanderweide he was not having any low back pain or back problems because, at that time, his low back and neck were giving him a lot of trouble.

Today, when he wakes up, it takes him a couple of hours to be able to move his neck around because it is so stiff. Since he cannot get more than a couple of hours of sleep a night at a time, he feels exhausted all the time. The pain continues to wake him up. Sometimes he can go back to sleep and sometimes he cannot.

If he reaches for something too quickly, he gets shooting pain down his left shoulder. His right arm occasionally gets worse than his left arm. The doctor said it was compensatory pain. Sometimes, at night he cannot sleep on his left side and during the day he gets some pain in his ribs, but it is nothing that would keep him from working. His low back gives him some pain down his left leg, but not always. His pain is mostly a three or a four out of ten, but sometimes it jumps to an eight. His ankle also gives him problems sometimes, but he was told that it would not keep him from working.

He cannot do the same job that he did before he got hurt because he is constantly hurting. He is usually miserable with pain, even with medication. He is currently on Hydrocodone and Soma. Medications make him forget about everything for about four hours, but then the pain returns.

He last saw Dr. Moers about three weeks before the hearing. Dr. Moers told him to do home physical therapy exercises. He does them about every other day, but they do not help and sometimes make him worse. Right now, he does not see Dr. Moers for any illnesses or physical problems, other than the ones related to this injury.

He suffers from hypertension and takes medication for it. He has been treating for hypertension with Dr. Hamilton for a couple of months. Before that, he treated with Dr. Paris. He was diagnosed as having hypertension about eight or ten years ago. He told Dr. Hamilton about his neck problems and they discussed treatment, but have not started anything. He also discussed his neck and back problems with

Dr. Paris. He did not talk to either one of them about a course of treatment through the county clinic. Claimant also has diabetes and is treating for it with Dr. Hamilton. He was diagnosed with diabetes about six years ago.

He weighed about 335 pounds when he was injured in 2003. He has lost about sixty pounds since then. He is not getting any medical help to lose weight. Neither Dr. Moers nor Dr. Eidman ever told him that he needs to lose weight or that his lower back problems might be because he is overweight.

He has problems in his upper extremities. The problem is mostly on the left side of his neck, shoulder, arm, and around his collar bone. His rib area was a problem, but is a bit better now. He has a lot of pain in his shoulder and arm and it is difficult to reach with his left hand. He has numbness in his hands and fingers. His neck is the worst problem he has as far as pain is concerned. It mostly occurs when he tries to look to the left or up. It causes a lot of pain and has gotten steadily worse since the accident. Sometimes, he can not get out of bed for weeks because of his lower back. Other times, it is not that bad. He has been unable to get out bed because of his lower back about five times over the last three years. Those flare ups lasted more than one week.

Claimant lives with his parents. During the day, he lives in agony. Sometimes he tries to read, but has difficulty concentrating. He occasionally reads, but does nothing else. If he is having a particularly good day, he will try to do laundry.

His neck feels worse now than it did in the spring of 2004. His ankle and rib pain has gotten better. He hates to say his lower back is better because it will incapacitate him for a while. He could not go back to classes at University of Houston because his neck pain makes it too difficult to study. He has not applied for any jobs since his injury in November 2003. He has done nothing since the injury to try to get a job, new career, or anything else in terms of seeking employment. He certainly would not be a good greeter at Wal-mart because it would require a smile and it difficult to smile with pain.

He has had other claims with the Department of Labor before this one. His first claim was in the 1970's for a crushed finger and knee injury. After that, he hurt his back once. He also had the ankle injuries.

Employer's Accident Report shows in pertinent part that:[74]

> Claimant was hit in his feet by timber, knocking him to the ground onto his chest. He felt a pop in the left side of his chest. His neck, back, and toes were affected by the work accident.

Medical Evidence

Reports of X-rays and CT scans state in pertinent part that:[75]

X rays	Taken on	Showed
Right ankle	1 Dec 03	No acute bony pathology/ mild soft tissue swelling
Left ankle and toes		No acute bony pathology
Chest and left ribs		Negative as to the ribs
Cervical spine		Moderate spondylosis of C3-4 through C5-6; possible unseen injury due to Claimant's body habitus
Lumbar spine		Mild general spondylosis and facet degeneration
Left ribs	23 Dec 03	Acute minimally displaced fractures of the 6th through 8th ribs
Ribs	10 Feb 04	Negative as to right ribs; adequate healing of left ribs, with exception of delayed union of 8th left rib
Left ribs	8 Mar 04	Equivocal fracture of 8th rib
Left ribs	30 Mar 04	Fractures of the 6th through 8th ribs not previously seen
(CT Scan) Ribs/Thorax	26 Apr 04	Fractures of the 6th through 8th ribs

Dr. Robert Moers' testified by deposition and his records show in pertinent part that:[76]

> He is a physician practicing mainly occupational medicine. He treated Claimant in connection with an injury that occurred on 29 Nov 03. He has been Claimant's treating physician in that capacity since 1 Dec 03.

[74] CX-2; EX-13.
[75] CX-14.
[76] CX-15; CX-16; CX-21.

On that day, Claimant complained about pain in his neck, lower back, ribs, left shoulder, left toes, right ankle, left foot, and right foot. Dr. Moers ordered x-rays and did a physical examination. The first set of x-rays was negative for rib fractures, but that was probably a consequence of Claimant's obesity. Claimant continued to complain of pain and a second set of x-rays showed acute minimal displaced fractures of the ribs.

On 18 Dec 03, Claimant returned to Dr. Moers with continued complaints of constant and severe pain in his cervical and lumbar back, right ankle, left shoulder, and ribs. On 8 Jan 04, he complained of pain in his shoulder blades, chest, and ribs. On 12 Feb 04, 20 Apr 04, 4 May 04, 20 May 04, 22 Jun 04, and 29 Jul 04, he complained of pain in his ribs, right ankle, left shoulder, and lumbar and cervical spine. On 31 Aug 04, he complained of pain in his right side, left shoulder, cervical spine, and left side lumbar radiating pain. On 7 Oct 04, 30 Nov 04, and 6 Jan 05, he complained of pain in his right ankle, left shoulder, and lumbar and cervical spine. On 10 Feb 05 and 8 Mar 05, he complained of pain in his ribs, right ankle, left shoulder, and lumbar and cervical spine. On 14 Apr 05, 1 Sep 05, and 12 Jan 06, he complained of pain in his right ankle, left shoulder, and lumbar and cervical spine. On 22 Jun 04, 29 Jul 31, 31 Aug 04, 7 Oct 04, 30 Nov 04, 6 Jan 05, 10 Feb 05, 8 Mar 05, 14 Apr 05, 31 May 05, 1 Sep 05, 20 Oct 05, and 12 Jan 06, Claimant complained of pain or numbness pain radiating into his arm and hand.

Claimant has had consistent complaints about his cervical spine and neck over time. On his last visit, he continued to complain of pain when he looks to the left, right, up or down with pain radiating from the cervical spine down into his left fingers. That has been a common complaint that Claimant has had since the beginning. He has had somewhat of a decreased grip on the left in comparison to the right. The decreased grip is greater than the ten percent that is normally seen.

Claimant had a positive cervical spine MRI in 2 Mar 05.

He eventually referred Claimant to Dr. Eidman, who is a very good board certified orthopedist.

Claimant has also consistently complained of pain across the lumbar area and occasionally into his left leg. The pain has now localized and goes through the buttock and down the left leg only. It does not go across anymore. The physical exam actually showed that his left leg has better range of motion than his right one. Dr. Moers thinks that there is something going on in the lower lumbar area that is trapping a nerve root. He ordered studies, but Claimant has not been able to get them. Until he has those studies, Dr. Moers is not going to know exactly what is going on with Claimant. Specifically, Dr. Moers requested a lumbar MRI, which Employer denied.

Claimant initially had some restricted internal and external rotation of his left shoulder. He gave pain patterns of 4 and 5, with pain on sleeping on the side, raising, reaching, and holding his arm down. As time progressed, his shoulder became stiffer in the morning. Dr. Moers feels that there is probably not a lot that needs to be done for his shoulder, other than physical therapy. He requested an EMG/NCV on Claimant's upper extremities bilaterally, but Employer denied the request. Even though Claimant's range of motion in his left shoulder has been unchanged since his initial exam and physical therapy will resolve any issues that he has with his left shoulder, the EMG would be in response to the radicular pain with numbness moving into his fingers, to correspond with the herniated disk in the cervical spine.

Initially, Claimant's right foot and ankle had some restricted range of motion in both dorsal flexion and plantar flexion. His pain patterns were quite high. Inversion and eversion remained negative. Those have progressed over time to cause some pain when he stands and walks on it, but he had a relatively negative physical examination and that condition has probably resolved. Dr. Moers recommended an MRI of the right foot and ankle, but Employer refused. The ankle tests were medically necessary because Claimant could have torn a tendon or something of that nature. However, over time, it just resolved with some of the pain patterns and the range of motion going back to normal. The original disease etiology as to his ankle has become stable, but it is not clear whether the proper diagnosis was made and something diagnostic needs to be done. If there is a torn tendon, it needs to be reflected in an impairment rating. That is the only reason the MRI of the right ankle and foot is necessary.

Dr. Moers ordered aquatic therapy for Claimant twice because his obesity makes it difficult for him to work with weight-bearing joints to get them to respond appropriately. Both requests were denied.

Claimant needs cervical EMG/NCVs and the lumbar MRI to find out what is going on. Claimant is still symptomatic and it is necessary to correlate a possible herniated disk with whether there is nerve root entrapment and denervation of the nerve roots. The EMG of the upper extremities is not as much for the shoulder as it is picking up the nerve roots coming out of the cervical spine.

He agrees with Dr. Nowlin that Claimant has not been sufficiently treated and has not reached maximum medical improvement.

He does not know much about Dr. Vanderweide, but has seen his report on Claimant. The report is accurate to the extent it states Claimant had a rib injury, but is otherwise incomplete. He does not agree with the conclusions.

Dr. Moers has treated a large number of longshoremen. He has seen longshoremen who do clerk/checker work and is familiar with that job. He does not believe that Claimant could have returned to work as a clerk/checker during the time he has been treating Claimant.

The total cost of his treatment to Claimant, related to the injury, is $2,901.35.

Dr. Moers' staff performed a functional capacity evaluation on Claimant in June 2004. Claimant demonstrated somewhat consistent effort. The report concluded that Claimant could function independently in the competitive labor market with or without accommodations and that Claimant qualified for the sedentary work category. Dr. Moers tried to get Employer to put Claimant to work on sedentary duty, but Employer refused to take Claimant back without a full release.

The March 2005 MRI had positive findings at the C4-5, C6-7, and C5-6 levels. At 3-4, there were hypertrophic or degenerative changes probably due to Claimant's age.

Dr. Moers wants additional testing to differentiate whether Claimant has a disk bulge, protrusion, or herniation. With herniations, EMGs usually come back positive because there is compression in the nerve root. A four millimeter bulge is a big bulge in the neck. He has never seen one that big that is not a herniation, although it might be possible.

Because it has been so long since the trauma, testing would not find any acute changes or determine whether some of Claimant's problems are related to his accident. At this point, everything is going to be chronic. Dr. Moers wants to determine whether or not Claimant has herniated disks. If Claimant has a herniated cervical disk, he would have complained of that before and someone would have picked that up just by the normal way he moved in and out of being a checker. If Claimant has a herniated lumbar disk, he would have had some type of restricted motion when he worked. If Claimant worked and never had any complaints until this injury, all those type of injuries would probably be related to his accident.

The spondylosis of C5 on C6 is not a problem right now.

Even prior to 29 Nov 03, Claimant could have had disk bulges or protrusions in his cervical spine that were asymptomatic and the changes could be related to degenerative changes that occur with age or as a result of obesity.

Claimant has objective lower back findings that show something has taken place. The objective findings include positive straight leg raising and decreased reflexes. Dr. Moers knows that there is something there, but is unsure exactly what it is. He does not recommend an EMG nerve conduction study for the lower back until a MRI of the lower back comes back positive.

An injury such as the one described by Claimant could aggravate or accelerate a pre-existing degenerative arthritic condition and make it more symptomatic. If the conditions in the cervical area where Claimant had the MRI existed prior to the injury, they were accelerated and aggravated during the fall.

Claimant's complaints about his neck and low back have been persistent and consistent over the years following his injury. His rib pain seems to have dissipated. Even though Claimant complains about his shoulder, it is more correlated to the neck because Claimant has pretty good range of motion in his shoulder. Claimant's foot problem is basically resolved as well. The main concern is his neck and lumbar area. Dr. Moers does not have an answer as to the lumbar area. People of Claimant's age and weight are going to have degenerative disk disease in the lumbar area.

Dr. Dan Eidman's testified by deposition and his records show in pertinent part that:[77]

He is a physician and board certified orthopedic surgeon. He treated Claimant in connection with injuries that he sustained on 29 Nov 03. Claimant was referred to him by Dr. Moers.

He first saw Claimant on 19 Apr 04. Claimant described his fall and complained of pain in his upper and lower back, radicular pain in both upper extremities, pain in his shoulder, and intermittent leg pain. The significance of Claimant's numbness and tingling in the left upper extremity, in light of his history, is that it indicates that he had some injury to his neck and/or the left shoulder with a compression of the nerve root or surrounding structures. The significance of Claimant's leg pain, with a history of a low back injury, is that it may represent a compression of either the associated nerve root or the spinal cord in that same area.

He performed a physical examination and noted diminished sensation in the C5-6 and C6-7 dermatomes in his left extremity. That indicates that Claimant has some compression of or trauma to those nerve roots. Claimant also had decreased ankle reflex in his lower extremities, which indicates that he has some compression of the L5 nerve root. Dr. Eidman's working impression was that Claimant had cervical and lumbar, as well as thoracic sprain with a probable associated cervical and/or lumbar disk herniation. He would normally have ordered a diagnostic test, such as an MRI scan or even perhaps a myelogram and CAT scan of those areas in addition to a possible nerve conduction study of both the upper and possibly lower extremities and a MRI of the shoulder, if Claimant's shoulder symptoms persisted.

Claimant returned on 6 Jul 04, with continued persistent symptoms in his neck and lower back and increased symptoms in his left upper extremity. His neurological examination was unchanged. Claimant was given a prescription to continue physical therapy at Dr. Moers' clinic. He recommended that Claimant undergo an MRI scan of his cervical and lumbar areas, as well as an EMG nerve conduction study of both upper extremities for further evaluation of his symptoms. Claimant needed an EMG nerve conduction study of his upper extremities because of his persistent symptoms of numbness and tingling, particularly in his left upper extremity.

Without those tests, Dr. Eidman cannot give Claimant a final diagnosis or prognosis. However, during the course of his treatment with Dr. Eidman, Claimant was never in a condition to return to work. He continued to have persistent symptoms in his neck and lower back, as well as his upper and lower

[77] CX-20, 22 23; EX-8.

extremities. Claimant requires daily pain medication to control his symptoms, and had undergone a couple of functional capacity tests that indicated he still had some deficiencies that would prevent him from returning to work.

If Claimant had a MRI scan of the cervical and lumbar area and his left shoulder, the doctors would be able to better plan a treatment program for him and also schedule additional diagnostic testing and treatment that would help him recover from his injuries. He would not release Claimant back to work without those tests. Claimant's symptoms alone are sufficient to keep him off work. Once the tests are done, Claimant may be able to return to work of some sort.

Even though Claimant has had one cervical MRI, he needs another because the first was done in March 2005 and Claimant's symptoms have since increased in his left upper extremity, as well as his neck. Claimant may have additional nerve root compression that needs to be evaluated.

On 1 Feb 05, Claimant reported increased numbness and tingling in his left arm, which can indicate additional or more severe nerve root compression of the involved areas.

As of March 2005, Claimant's rib symptoms in his chest area diminished to the extent that he reached maximum medical improvement as to his injured ribs. He has not reached maximum medical improvement as to any other complaints.

Dr. Eidman reviewed Dr. Nowlin's report and agrees that the recommended diagnostic testing is reasonable. He also has reviewed Dr. Vanderweide's 17 May 04 report, but does not agree with it. Dr. Eidman looked at the MRI films themselves, which is better than reading the report.

Based on his review of Claimant's MRI film, Dr. Eidman believes Claimant has a disk herniation at the C5-6 and C6-7 levels, with cervical spondylosis and bilateral foraminal narrowing at both levels. That is contrary to the reviewing radiologist's report, which described bulges or protrusions instead of herniations. A herniation is when the nucleus pulpous or the inner portion of the disk breaks through the structure of the disk or involves an annular tear through the center of the disk.

On 22 Nov 05, he ordered cervical nerve blocks for Claimant. They are performed at the imaging center by a neuroradiologist. They help reduce swelling and inflammation around the involved nerve roots. The block usually involves the injection of a long-acting analgesic medication in addition to a steroid compound.

Employer refused to authorize the lumbar MRI, the nerve conduction studies in the shoulders, the nerve blocks, or the additional cervical MRI.

Claimant's last visit was 15 Sep 06. He had persistent radicular symptoms of his left upper extremity and weakness of his left elbow area reflex, which indicates some type of difficulty with nerve conduction from the C5-6 level. Claimant also had diminished sensation in the C5-6 and C6-7 dermatomes in his left upper extremity, as well as the C5-dermatome in his right upper extremity. That reflected a progression in his symptoms since his previous office visit and was one of the reasons for recommending a new MRI scan of his cervical spine. Since his injury, Claimant always had some symptoms in his left leg and lower extremity, but now has some additional weakness in both of his ankle reflexes, which causes concern about additional nerve root compression.

All of Dr. Eidman's medical charges have been in connection with treatment related to the 29 Nov 03 injury. The total charges are $1,282.50 and Claimant has a balance of $1,208.26.

Claimant presently takes Hydrocodone, as well as a muscle relaxant. He has also been taking Mobic, an anti-inflammatory, and was given a prescription for Lyrica for his continued neurologic symptoms.

He is not recommending any surgical intervention until more testing is done.

Claimant is overweight, but his weight is not related to his persistent symptoms. However, Claimant's size could aggravate his symptoms in his lower back, depending upon his activity level.

Claimant has spondylosis, a degenerative condition not related to trauma in both his cervical and lumbar spine. It is possible that the problems Claimant had with his neck and lower back could have started with a 1984 fall, but Claimant did not have any symptoms prior to his injury in November 2003. It is possible to have disk bulges or protrusions and be asymptomatic.

Claimant's ankles have stabilized and do not need additional testing. Dr. Eidman would no longer recommend that Claimant undergo cervical facet blocks until he has a second cervical MRI because the MRI would provide more current information, particularly in light of the increased symptoms that Claimant had at the time of his last office visit.

If Claimant had degenerative changes before 29 Nov 03, the injury that day aggravated or accelerated any pre-existing condition he may have had.

Dr. David Vanderweide's testified by deposition and his records show in pertinent part that:[78]

He is Chief of Orthopedics at Memorial Hermann Hospital. On a weekly basis, he examines two or three claimants on behalf of carriers and employers.

He saw Claimant at the request of Employer on 17 May 04. He does not recall the air conditioning not working and has never heard of a patient being left waiting in an examining room for three hours. Claimant complained of pain in his left chest wall radiating beneath the left breast around to the left shoulder blade. He also complained of discomfort in the paravertebral musculature through the cervical region. He did not complain of pain in his low back, ankles, left shoulder, or left foot. He did not complain of any radicular symptoms that would have suggested nerve compromise in the spine. He did not complain of any pain or numbness in his arms or fingers.

Dr. Vanderweide conducted a physical examination which focused on Claimant's left rib cage and cervical spine. The rib cage was evaluated by palaptory examination around the left side. The cervical spine was evaluated neurologically and for range of motion. Claimant appeared to have healed rib fractures and complained of discomfort in their area. Claimant had full cervical range of motion, but reported pain with left-sided rotation.

Dr. Vanderweide reviewed some of Dr. Moers' records and Dr. Nowlin's report, but did not review Dr. Eidman's records. Dr. Moers' records indicated Claimant had complained about lower back, left shoulder, and right ankle pain, but Claimant did not complain about any of those problems to him. He concluded that Claimant required no medical care and could return to work. He questioned whether the continued use of narcotics was necessary.

Rib fractures generally heal within eight to ten weeks and most patients return to work within twelve weeks.

In March 2005, Dr. Vanderweide was provided the radiologist's report of the MRI. Based on his review of the report, he did not modify his assessment of Claimant. The report discussed disc degeneration associated with aging and not a specific trauma. However, it is possible that a trauma could aggravate such a condition. It is also possible that someone could have the conditions described and suffer great pain, as Claimant has described to other doctors.

[78] EX-9; EX-17.

Dr. Donald Nowlin's records show in pertinent part that:[79]

> He conducted an independent medical examination on 17 Nov 04. He focused on Claimant's left arm, shoulder and foot, chest wall, ankles, neck, and thoracic spine. Claimant described his accident as directly falling on his face and chest. Claimant reported that he went to the emergency room the day after the accident, but that the wait was so long he went home and later went to his family doctor. He complained of symptoms in his neck, back, and left shoulder, elbow, and hand. Dr. Nowlin reviewed records from Dr. Moers, Dr. Eidman, and Dr. Vanderweide, along with the 26 Apr 04 CT scan film of Claimant's ribs.
>
> Upon physical examination, Dr. Nowlin noted Claimant was morbidly obese, but was comfortable and arose without hesitation or support. He noted Claimant had neck pain upon compression and shoulder pain upon depression.
>
> He diagnosed Claimant with healed rib fractures, hyperextension cervical strain, chronic left shoulder pain, and decreased sensation of the left thumb, index and long fingers. He concluded that Claimant's complaints received minimal investigation and Claimant needed an MRI of the cervical spine and left shoulder and an EMG of the upper left extremity, followed by a re-evaluation.
>
> He opined that there was a causal connection between Claimant's symptoms and accident and Claimant would not reach maximum medical improvement (MMI) until nothing further testing confirms no more can be done. He observed that Claimant had good function of the cervical spine, left shoulder and left extremity, even though he suffered persistent pain.

A Functional Capacity Evaluation report from MES shows in pertinent part that:[80]

> A three hour FCE was performed on 19 Nov 04. A combination of screening tests and clinical observations indicated Claimant gave reasonable, if not full, voluntary effort, even though there were some signs of sub maximal effort related to pain avoidance and ability perception.
>
> Claimant demonstrated an ability to function at a light-medium physical demand level. That included a lifting limit of 40 pounds; mixed standing and sitting; no kneeling, squatting, or climbing ladders; limited bending, pushing, and twisting; and limited overhead reaching on the left side.

[79] CX-17; EX-10.
[80] CX-18.

A 2 Mar 05 MRI report states in pertinent part that:[81]

> Claimant has a 3 to 5 mm posterior disc bulge from C4-C5 to C6-7, most prominent at C4-C5 and exerting mild mass effect on the ventral aspect of the spinal cord and to a lesser extent C5-C6. Claimant has moderate neural foraminal narrowing at C3-C4 and C6-C7 on the left; C5-C6 on the right; and C4-C5 bilaterally, with possible involvement of the respective nerve root.

Union and State forms show in pertinent part that :[82]

> Claimant injured his ankle on 21 May 01 and was totally disabled from that date until 29 Sep 03.

Department of Labor forms show in pertinent part that :[83]

> Claimant was paid temporary total disability from 30 Mar 00 to 21 Feb 01 and then a scheduled permanent partial disability for his right foot.
>
> On 4 Dec 03, Dr. Moers completed a request for examination or treatment that noted Claimant had complained of pain on his left side, along with pain in his ankles, lumbar and cervical back, and shoulder. The form stated Claimant would be unable to work for an indefinite period.
>
> On 11 Dec 03, Employer filed a notice of payment without an award as of 30 Nov 03, based on an average weekly wage of $5.03.
>
> Employer paid temporary total disability to Claimant from 30 Nov 03 to 17 May 04, at an agreed compensation rate of $232.69.
>
> From 29 Nov 03 through 4 Jan 06, the only earnings Claimant had was a total of $175.00 from self employment.
>
> On 4 Jun 04, Employer filed a notice of final compensation payment based on Claimant's release to work as of 18 May 04.
>
> On 15 Sep 04, Employer filed another notice of final compensation payment based on Claimant's release to work as of 18 May 04.
>
> On 21 Dec 05, Employer filed a pre-hearing statement that indicated it disputed aspects of the claim.

[81] CX-19.
[82] CX-12.
[83] CX-1,CX-3-7; CX-12, p. 1; EX-3-7.

Claimant's pay records show in pertinent part that :[84]

Claimant's earnings were:

1998	$28,862.00
1999	$25,672.00
2000	$ 8,026.00
2001	$ 5,360.00
2002	$ 0.00
2003	$ 521.00

ANALYSIS

The medical evidence upon which this case turns reveals a fundamental gap between the opinions of Drs. Moers, Eidman and Nowlin, and that of Dr. Vanderweide. Drs. Moers and Eidman were Claimant's treating physicians and saw Claimant multiple times over an extended period. Dr. Vanderweide saw Claimant on only one occasion. Even discounting Claimant's allegations that Dr. Vanderweide performed no examination and only asked a few questions, he still appears to have based his opinion heavily on the fact that Claimant did not report radicular symptoms or any pain in his low back, ankles, left shoulder, arms, fingers, or left foot.

It makes no sense that a claimant would minimize symptoms when providing a history to an employer's medical examiner, but even if that were the case, the record shows that Claimant consistently reported such problems to his treating physicians. Although Dr. Nowlin, like Dr. Vanderweide, saw Claimant only once and was not a treating physician, his opinion is much more consistent with that of Drs. Moers and Eidman. Consequently, I find that the testimony and opinions of Drs. Moers, Eidman and Nowlin are worthy of much more weight than that the opinions and testimony of Dr. Vanderweide.

Nexus of Claimant's Back Condition to his 2003 Fall

Claimant has presented medical opinions that his current condition could have been caused by his fall in 2003 or a consequence of a pre-existing condition aggravated by that fall. Thus, he has raised the Section 20(a) presumption. The record contains evidence that Claimant's back problems could be purely a consequence of natural progression and not accelerated by the trauma of the fall. I find sufficient and substantial evidence to rebut the presumption and place the burden upon Claimant to establish by the weight of the evidence that his current back condition was either caused by the fall or is a pre-existing condition aggravated or accelerated by the fall.

[84] CX-8-11; EX-11-12.

Given the testimony of Dr. Moers and Dr. Eidman, Dr. Nowlin's report, and the absence of complaints prior to the fall, the weight of evidence in the record reflects that it is more likely than not that Claimant's current back condition was either caused by the fall or, at a minimum, is a pre-existing condition aggravated or accelerated by the fall.

Nature and Extent of Disability

Claimant's testimony and the weight of the credible medical evidence is that Claimant was unable to return to his original job following his fall in 2003. The only evidence to the contrary is Dr. Vanderweide's opinion.[85] I therefore find Claimant to be presumed totally disabled until Employer establishes suitable alternative employment. Employer offered no evidence of any suitable alternative employment, rendering any evidence of Claimant's possible residual capacity for work irrelevant. Consequently, Claimant is deemed totally disabled as of the date of his injury.

Similarly, the weight of credible medical evidence reflects that until further tests are performed, it is impossible to determine if Claimant has reached MMI as to his back, neck, and shoulder. He has reached MMI as to his ankle and ribs, but those are not the conditions resulting in his current total disability. As a result, Claimant has not yet reached MMI and is temporarily totally disabled.

Medical Care

Dr. Vanderweide stands alone in suggesting Claimant requires no further medical care. Dr. Moers recommends lumbar, right ankle and additional cervical MRIs and bilateral upper extremity EMG/NCV tests. Dr. Eidman joins in the recommendation of a lumbar and additional cervical MRI and bilateral upper extremity EMG/NCV tests, but does not believe the ankle MRI is medically necessary. Dr. Nowlin recommends a cervical MRI and left upper extremity EMG/NCV test.

I find the treating and independent physicians opinions deserving of greater weight and find that the evidence establishes that the lumbar and additional cervical MRI and bilateral upper extremity EMG/NCV tests are reasonable, necessary, and related to his covered injury. I do not find that the ankle MRI is reasonable and necessary.

I similarly find that all care obtained by Claimant from Dr. Eidman and all care obtained by Claimant from Dr. Moers after 29 Nov 03 was reasonable, necessary, and related to his covered injury. Therefore, Claimant is entitled to reimbursement or payment of such care.

[85] See the discussion of medical evidence weight, *supra.*

Average Weekly Wage

The parties have no basic dispute as to the facts underlying their disagreement on the correct average weekly wage. Claimant worked only a few days in his job before suffering the injury that is the basis of this claim. Claimant's work history over the years preceding that accident was marked by long periods of no income due to a number of injury and disease related disabilities. The parties agree that neither Sections 10(a) nor 10(b) can be applied and that Section 10(c) must be used instead.

Employer initially suggests taking Claimant's total earnings for the 52 weeks immediately preceding the injury and treating that as Claimant's pre-injury average annual earning capacity. Because of his ankle injury, Claimant only earned $367.50 during that period, which would result in an average weekly wage of $367.50/52 or $5.95. In the alternative, Employer suggests arriving at an annual wage by averaging Claimant's wages during the 8 years preceding his injury, which according to Employer's brief results in an average annual wage of $11,499.25 and a corresponding AWW of $221.14. However, Employer's calculations relied solely on figures drawn from a document that while cited as its exhibit 7, in actuality was an attachment to the brief and was not admitted into evidence.[86]

Claimant argues that, consistent with case law, the Court should arrive at a figure which does not penalize Claimant for missed wages due to personal injury or illness not likely to reoccur. I agree with Claimant's assessment of the controlling law. Claimant's testimony was somewhat equivocal on what periods represented a full year of work. Consequently, I find that a fair and reasonable approximation, based on the record available, of Claimant's average annual earnings is to aggregate 1998 and 1999. That yields a total of $54,534.00, which, when divided by 2, yields an average annual earnings of $27,267.00 and converts to an AWW of $524.36 ($27,267.00/52).

Penalties

Claimant argues for penalties based on the absence of any controversion and Employer's brief does not address the subject. While the record does not contain any evidence of controversion, EX-4 shows that on 4 Jun 04, Employer filed a notice of termination of benefits. The notice included the name of Claimant and Employer, the date of injury, and that Employer was terminating payments because a doctor released Claimant to return to regular work. Accordingly, I find the claim was controverted on 4 Jun 04.

[86] *See* fn. 4. (even if I considered the data, my ultimate decision as to AWW would have remained the same).

ORDER AND DECISION

1. Claimant injured his shoulder, ankle, toes, ribs, lumbar and cervical back, and neck in the course and scope of his employment under the Act on 29 Nov 03.

2. Claimant has not reached maximum medical improvement.

3. Claimant's average weekly wage at the time of that injury was $524.36.

4. Claimant has been and continues to be temporarily totally disabled from 29 Nov 03.

5. Employer shall pay Claimant temporary total disability compensation from 30 Nov 03, to present and continuing based on an average weekly wage of $524.36.

6. Employer controverted the claim on 4 Jun 04. Employer shall pay penalties on the above amounts in accordance with Section 14(e) until that date.

7. Claimant's medical treatment with Dr. Moers and Dr. Eidman has been reasonable, appropriate, and necessary and related to his injury of 29 Nov 03. Employer shall pay the costs of that past care.

8. Employer shall pay all reasonable, appropriate, and necessary future medical expenses arising from Claimant's 29 Nov 03 injury, including a lumbar and additional cervical MRI and bilateral upper extremity EMG/NCV tests. It does not include the ankle MRI. Until such testing is complete, it includes appointments with Dr. Moers and/or Dr. Eidman and such non-surgical treatment modalities that they might prescribe, including physical therapy, aquatic therapy, medications, and in the event that the testing indicates they are appropriate, nerve blocks.

9. Employer shall receive credit for all compensation heretofore paid, as and when paid.

10. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982).[87]

12. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.

[87] Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring Co., et al.*, 16 BRBS 267 (1984).

13. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[88] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. In the event Employer elects to file any objections to said application it must serve a copy on Claimant's counsel, who shall then have fifteen days from service to file an answer thereto.

So ORDERED.

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PATRICK M. ROSENOW
Administrative Law Judge

[88] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 813 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **27 Oct 05**, the date this matter was referred from the District Director.